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In the

Supreme Court of the United States

October Term, 1969.

JAMES A. MURRAY AND EDITH B. MURRAY,
partners, doing business as NASSAU CHINA COMPANY,
Petitioners,

vs.

THE HONORABLE ROY W. HARPER,
Judge of the United States District Court for the Eastern and Western Districts of Missouri, *Respondent.*

BRIEF OF RESPONDENT ROY W. HARPER, DISTRICT JUDGE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1290.

Only the Hon. Roy W. Harper, Judge of the United States District Court for the Eastern and Western Districts of Missouri, is named respondent to this petition. The petition seeks review of the denial by the Court of Appeals for the Eighth Circuit of petitioners' petition therein for writ of prohibition or mandamus to compel respondent to disqualify himself as presiding judge in the cause styled *James A. Murray, et al.*, v. *L. G. Balfour*

Company, No. 737 in the United States District Court for the Western District of Missouri. Because L. G. Balfour Company was not a party to the proceeding in the Court of Appeals for the Eighth Circuit, review of which is sought by petitioners herein, it has no standing as a party in this Court in this proceeding. However, at the request of respondent its counsel have prepared for and on behalf of respondent the following brief in opposition to the petition for writ of certiorari.

In the Appendix hereto are set out in full certain portions of the record which are referred to in the petition or the certified record but not set out therein in full. References herein to the petition are identified as (Pet.); to petitioners' appendix as (Pet. A-); to the record in this case certified by the Court of Appeals for the Eighth Circuit as (R); and to respondent's appendix as (Resp. A- , infra).

STATEMENT OF THE CASE.

Petitioners are plaintiffs in *Murray, et al.,* v. *L. G. Balfour Company,* No. 737 in the United States District Court for the Western District of Missouri. The case is pending on the original complaint (Resp. A-12, infra). The professional legal fraternity, Delta Theta Phi, is not and has never been a party to that suit (Pet. 11; R. 136). All defendants named in that suit other than L. G. Balfour Company have been voluntarily dismissed by plaintiff (Resp. A-8, 9, infra). No process was ever issued or served upon any party defendant other than L. G. Balfour Company (Pet. 6).

Case No. 737 is one of 13 related antitrust cases described on page 5 (n. 2) of the petition herein. By Order entered May 19, 1967, and continued in effect thereafter, the cases are consolidated for all motions,

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pleadings, orders or other filings, which shall be deemed to apply equally to each of the actions as though individually filed therein (Pet. A-7).

Four district judges have presided in these cases including respondent. Two of them have been disqualified at the instance of plaintiffs.

On Judge Duncan's retirement in 1965, the cases were assigned to the Hon. John W. Oliver, Judge of the Western District of Missouri. Because Phi Delta Theta Fraternity was plaintiff in one of the related cases (No. 683), when the cases were transferred to Judge Oliver he advised all parties that he had joined Phi Delta Theta when a student some 30 years before and all parties, by their then counsel (including Mr. Spanos), expressly waived any right to raise any question concerning possible disqualification of him on that ground (Pet. A-16). Thereafter, the question of Judge Oliver's college membership in Phi Delta Theta was injected into the case by petitioners' counsel (Pet. 6, 7; A-17) and by reason of that fact, and in anticipation that an affidavit of bias would shortly be filed against him, Judge Oliver recused himself on April 1, 1968 (Pet. 6, 7; R 97, 98). The fact that Judge Oliver was disqualified for bias is admitted by petitioners (Pet. 7; R 98).

In petitioner Murray's affidavit relating to Judge Collinson (R 97), certain alleged information directed to Judge Oliver emanating from Mr. Spanos further illuminates the fact that Judge Oliver was forced to recuse himself by reason of claims of bias and prejudice asserted against him by Mr. Spanos, attorney for petitioners herein and for all of the plaintiffs in the related cases above described (R 96, 97). Indeed, in the Murray affidavit there is contained certain information relating to the alleged state of mind of District Judge Elmo B. Hunter of the Western District of Missouri which, no

doubt, was included to disqualify in advance Judge Hunter as the only remaining District Judge in the Western District qualified to preside in these cases, against the possibility of reassignment of these cases to him (R 96, 97).

Upon Judge Oliver's disqualification the consolidated cases were transferred to Judge Collinson on April 1, 1968 (Pet. A-17, 18). Judge Collinson attempted to process the cases toward trial (R 60, 62). On September 17, 1968, he entered an order requiring that defendant serve interrogatories and motions to produce on or before October 28, 1968 (R 62), which defendant did in all the related cases. Plaintiffs requested various extensions of time to respond which were granted, and Judge Collinson directed plaintiffs to comply at various times during January and February, 1969, which plaintiffs failed to do (R 66, 69). Plaintiffs moved to vacate the order of September 17, 1968, and Judge Collinson ordered a conference which was held on April 7, 1968 (R 69). Mr. Spanos, counsel for plaintiffs, including petitioners, withdrew from the conference and refused to participate in it in violation of the order of Judge Collinson. This resulted in the withdrawal of Mr. Spanos' associate counsel from the cases (R 70, 71). When plaintiffs' counsel refused to participate in the conference he was advised that, because of this disregard and disobedience of the court's orders, Judge Collinson would impose the sanction of dismissal upon plaintiffs (R 70). Before Judge Collinson had the opportunity to act and impose sanctions upon plaintiffs, plaintiff Buchroeder (No. 729) filed a motion for change of judge, affidavit of prejudice and certificate of good faith of counsel, all directed against Judge Collinson (R 71). On or about August 18, 1969, petitioner Murray filed his affidavit of prejudice also directed against Judge Collinson but alluding as well to alleged

improprieties by Judge Oliver and Judge Hunter, both of the Western District of Missouri (R 96, 97).

On the same date that the Buchroeder motion for change of judge and affidavit of prejudice were filed, there were served and filed by plaintiffs in all the related cases, including petitioners' case No. 737, a motion to stay all proceedings and memorandum in support thereof (Pet. A-6, 7; Resp. A-1-4, infra). In the motion to stay it was requested that all proceedings in all cases be stayed pending the final determination of the motion to change judge or until the filing in each of the related cases, including No. 737, of a similar motion. The motion was based upon the memorandum in support, the affidavit of prejudice by Buchroeder and all of the pleadings and papers in all of the related cases. The memorandum in support stated that all of the related cases in which it was captioned, including petitioners Murray case:

> "• • • have for many years been treated as a single group or unit because of the identity of issues although not of parties, and generally rulings made in one of the cases have been applicable to all of the cases in the group. The issues raised by the Motion to Change Judge filed in cases 683, 684 and 729 are common to all of the cases in the group, including the above identified cases, and the disposition of the said Motion to Change Judge in cases 683, 684 and 729 would be dispositive of the identical issues which exist in each of the above identified cases as well." (Pet. A-6, 7; Resp. A-3, 4, infra.)

The motion to stay and memorandum in support are signed by Mr. Spanos and Mr. Oberlander as attorneys for plaintiffs in all the related cases, including petitioners' case No. 737.

Judge Collinson disqualified himself by order print at Pet. A-13-15. In this order he stated:

> "• • • the reading of this affidavit from a judici viewpoint, with the knowledge that I had to acce these allegations as true and pass on their leg sufficiency, has been my most unpleasant experien in twenty years on the trial bench. However, I ce tainly would not want to preside at a trial at whi counsel for one of the parties felt about the Cou as, obviously, counsel for the movant must."

Because of their consolidation and the identity of t issues, Judge Collinson disqualified himself in all t related cases.

Because all of the district judges in the Weste District of Missouri were then disqualified (consideri the references to Judge Hunter in petitioner Murray affidavit directed to Judge Collinson, R 96, 97), t cases were transferred and assigned to respondent.

Respondent first met with counsel for the parties July 29, 1969. Three days later, on August 1, 19 Mr. Spanos, counsel for petitioners and all plaintiffs the related cases, wrote to respondent requesting that disqualify himself (Pet. 13, 14).

Plaintiffs, including petitioners, jointly moved th respondent vacate the order of September 17, 19 entered by Judge Collinson, which motion responde denied (Pet. 14).

Respondent entered a Pre-trial Order in all the relat cases on August 4, 1969, in which he ordered *inter a* that all parties proceed with their discovery and set t cases for trial beginning on February 16, 1970 (R 1 152, 153). All the plaintiffs, including petitioners, joint moved to vacate that order, which motion responde denied.

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On August 21, 1969, the petitioners herein filed their motion for change of judge, the affidavit of prejudice by Murray directed against respondent (R 37) and Exhibit A thereto, being the affidavit of prejudice by Murray directed against Judge Collinson and, incidentally, against Judges Oliver and Hunter as well (R 53, 96, 97).

On September 2, 1969, all of the plaintiffs other than petitioners moved the district court for an order staying all proceedings in each and all of the related cases pending the final determination of petitioners' motion to change judge, or until the filing in each case of a similar motion to change judge, stating that the motion to stay was made on the basis of the affidavit of prejudice by petitioner Murray, all of the other moving papers filed in connection with the motion in the Murray case and on the basis of all the pleadings and papers in each of the related cases (Pet. A-6, 7; Resp. A-5-8, infra). In support of the motion to stay, and concurrently therewith, all of the plaintiffs in the related cases filed a memorandum stating that because of the identity of the issues all of the cases have for many years been treated and handled as a single group or unit and rulings made in one of the cases have similarly been applicable to all of the cases in the group, that the issues raised in petitioners' motion to change judge are common to all of the cases in the group and disposition of the said motion would be dispositive of the identical issues which exist in each of the related cases (Pet. A-7).

On September 29, 1969, petitioners and all plaintiffs filed in this Court their application for stay of further district court proceedings in the related cases pending the filing of a petition for writ of certiorari in this Court for review of the denial by the Court of Appeals for the Eighth Circuit of petitioners' and plaintiffs' petition

therein for writ of mandamus or prohibition to review respondent's denial of petitioners' and plaintiffs' motion to vacate Judge Collinson's order of September 17, 1968, and respondent's order of August 4, 1969. The application for stay of proceedings was denied on October 7, 1969, by Mr. Justice White. No petition for certiorari concerning these matters have been filed in the Supreme Court of the United States.

Meanwhile, on September 8, 1969, respondent denied the motion for change of judge by memorandum opinion and order (Pet. A-2-11).

On October 14, 1969, petitioners filed in the district court their motion for rehearing for motion for change of judge (R 145), the affidavit of counsel as to good faith (R 147) and a further affidavit of prejudice (referred to in the motion for rehearing as the "Supplemental Affidavit of Prejudice") by Murray (R 133-144). In the supplemental affidavit it is not stated that the complaint in petitioners' case names Delta Theta Phi as a defendant (R 135). As stated above, that fraternity is not named as a defendant in petitioners' complaint and no amended complaint has been filed by petitioners. On October 17, 1969, respondent granted leave to plaintiffs to file amended complaints but petitioners Murray refused and declined to file an amended complaint, and have never filed an amended complaint at any time (Resp. A-11, 12, infra).

Respondent denied the motion for rehearing for motion of change of judge by order filed October 29, 1969 (Pet. A-11, 12).

On December 4, 1969, petitioners filed their petition for writ of mandamus or prohibition in the Court of Appeals for the Eighth Circuit (R 1) which was denied by order entered December 9, 1969 (Pet. A-1).

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SUMMARY OF ARGUMENT.

I. 28 U. S. C., §144, and the decision of this Court in the *Berger* case require that the affidavit of prejudice state facts and reasons which give fair support to the charge that the accused judge is personally biased or prejudiced and it is the duty of the judge to pass on the sufficiency of the affidavit as a matter of law.

II. None of the affidavits of prejudice against respondent is legally sufficient:

A. The affidavit of prejudice does not state any fact or reason which gives fair support to the charge of personal bias or prejudice against petitioners or in favor of an adverse party.

B. The supplemental affidavit of prejudice does not state that Delta Theta Phi legal fraternity is a party to petitioners' case and respondent's membership in that fraternity is not a fact or reason which gives fair support to the charge that respondent is personally biased or prejudiced.

C. The second supplemental affidavit of prejudice is legally insufficient in that the charges therein relate only to respondent's rulings in the case, do not establish any personal bias or prejudice and the affidavit is barred by the provision of Title 28, U. S. C. §144 that a party may file only one such affidavit in any case.

III. The disqualification proceeding against respondent by petitioners is barred by the provision of 28 U. S. C., §144, that a party may file only one such affidavit in any case, in that prior disqualification proceedings in related cases which resulted in the disqualification of prior judges were adopted by petitioners as applicable to petitioners' action as though individually filed therein.

ARGUMENT.

I. The Rule of *Berger* v. *United States*.

Petitioners concede that 28 U. S. C., §144, and the decision of this Court in *Berger* v. *United States*, 255 U. S. 22, 41 Sup. Ct. 230, 65 L. Ed. 481 (1921), have been applied and interpreted by the courts of appeals and the district courts not to require automatic disqualification of a judge upon the filing of an affidavit of prejudice and certificate of counsel. Petitioners concede that the courts of appeals have interpreted the statute and the *Berger* ruling as imposing on the litigant the burden of alleging facts and reasons which give fair support to the charge that the accused judge is personally biased or prejudiced, and that it is the duty of the accused judge "to pass on the sufficiency of the affidavit as a matter of law" and to recuse himself only if the allegations "are sufficient to support the conclusion that the judge has a personal bias or prejudice against the defendant or in favor of the plaintiff" (Pet. 22, 23, and citations at 23). And petitioners concede that the memorandum opinions of respondent in this case follow and apply, and are consistent with, the interpretations and decisions of the courts of appeals and the district courts (Pet. 24, 25).

The thrust of petitioners' argument is that the rulings by the courts of appeals are inconsistent with the statute and with the rulings of this Court, particularly in the *Berger* case. However, the statute does not prescribe the automatism urged by petitioners, nor did the *Berger* case so interpret it.

The statute provides that the affidavit must be "sufficient," that it shall state "facts and the reasons for the belief that bias or prejudice exists," that is must be made and filed by a "party" and it must show "that the

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judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." The affidavit must be accompanied by the certificate of counsel of record stating that it is made in good faith. A party may file only one such affidavit in any case.

The *Berger* case interprets the language of the statute (then Section 21 of the Judicial Code) as follows:

> "Of course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U. S. at p. 33, 34;
>
> "• • • the • • • provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice • • • is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion • • •" 255 U. S. at p. 33;
>
> "[Ex Parte American Steel Barrel Co., 230 U. S. 420, 32 Sup. Ct. 1007, 57 L. Ed. 1379] established that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." 255 U. S. at p. 31;
>
> "[In] *Henry* v. *Speer*, 201 Fed. 869, 120 C. C. A. 107, • • • a petition for mandamus • • • was refused on the ground that the affidavit did not conform to Section 21 in that it omitted to charge 'personal' bias, a charge of such bias, it was held, being a necessary condition." 255 U. S. at p. 32.

The court did hold that the section withdraws from the presiding judge a decision upon the truth of the matters alleged and that if the affidavit shows the objectionable inclination or disposition of the judge, it is his duty to proceed no further in the case. And the

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court stated clearly the considerations in the administration of justice which influenced its decision and reasons:

> "And in this there is no serious deteriment to the administration of justice nor inconvenience worthy of mention, for of what concern is there to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than 10 days before the commencement of the term."
>
> "* * * and the section in its care permits but 'one such affidavit'." 255 U. S. at p. 35.

On the facts of the *Berger* case there was no question but that the bias or prejudice allegedly harbored by the judge against the defendants there was *personal.* In that case there was a single affidavit directed to a single judge. Compare that with the instant case where the disqualification device has been used in respect to three district judges, the enforcement of their orders has been frustrated and avoided and, together with the strategy of interlocutory appeals and petitions, the prosecution of the case has been delayed for years.

In substance the *Berger* case holds that disqualification is not automatic upon the filing of the affidavit but the district judge has a lawful right to pass upon the sufficiency of the affidavit. This holding has been followed and applied by the lower courts. The *Berger* case holds that in passing upon the sufficiency of the affidavit the judge must determine that the affidavit states the facts and reasons for the belief of the existence of bias or prejudice, that the affidavit charges "personal" bias, a necessary condition, and that the reasons and facts stated for the litigants' belief *give fair support* to the charge of a bent of mind that may prevent or impede

impartiality of judgment. It is submitted that it is these holdings in the *Berger* case which have been applied by the courts of appeals and the district courts, and, as conceded by petitioners, were applied by respondent in his rulings on petitioners' motion and affidavits in this case.

The key phrases in the statute as interpreted by this Court are that the reasons and facts for the belief the litigant purportedly entertains are an essential part of the affidavit and *must give fair support* to the charge of a bent of mind that may prevent or impede impartiality of judgment, and the bias must be personal either against the affiant or in favor of any adverse party.

The requirement that the reasons and facts alleged must give fair support to the charge of a bent of mind places a burden upon the party affiant to demonstrate the charge by facts and reasons.

This is the burden which respondent ruled rests upon petitioners. This is the standard against which respondent ruled the sufficiency of petitioner's affidavit (Pet. A-5). It was clear in respondent's mind that, as ruled in the *Berger* case, the statute withdraws from the presiding judge a decision upon the truth of the matters alleged. In the Memorandum Opinion and Order, respondent states:

> "The court is precluded from refuting the facts alleged regardless of their nature. It cannot pass on their truth, but rather must accept them as fact. Hence, review is limited to sufficiency and compliance with the statute. [Citations]" (Pet. A-5).

II. None of the Affidavits of Prejudice Against Respondent Is Legally Sufficient.

A. The Affidavit of Prejudice.

Turning to the affidavit itself (R 37-51), respondent found that aside from the bare allegation that he has a personal bias and prejudice and is unable to exercise his judicial functions impartially and fairly, which he branded as a conclusion not a fact nor a reason, therefore legally insufficient to comply with the requirements of the statute to disqualify a judge, the first 11 paragraphs dealt with matters which occurred in these cases prior to respondent's entry into them (Pet. A-9). The affiant admits that the sole source of his information is his attorney, Mr. Spanos (who also executed the affidavit of counsel of record of good faith) (R 38, par. 4). Paragraph 5 is in the nature of a legal brief. Paragraph 6 expresses the affiant's opinion unsupported by any facts or reasons; hence, is indeed a conclusion, but it characterizes the affiant's belief that respondent has a personal bias and prejudice against all the antitrust plaintiffs and in favor of the antitrust defendant and refers not to the affiant's case but to the related cases collectively as a unit.

Paragraph 7 relates to the Buchroeder affidavit against Judge Collinson and Judge Collinson's memorandum disqualifying himself in which he states (R 41, 42):

> "The reading of this affidavit from a judicial viewpoint, with the knowledge that I had to accept these allegations as true, and pass on their legal sufficiency, has been my most unpleasant experience in twenty years on the trial bench."

Yet, in paragraph 7, the affiant criticizes Judge Collinson for failing to deny the allegations of the Buchroeder affidavit in his Order of July 3, 1969 (R 42).

Paragraph 8 further criticizes Judge Collinson for not ruling on the Buchroeder affidavit of prejudice from May 13, 1969, until July 3, 1969, and seems to infer some impropriety on the part of Judge Collinson for this delay. It is difficult to understand how this relates to respondent.

Paragraph 9 relates that petitioner Murray directed his attorneys to prepare an affidavit of prejudice against Judge Collinson for his signature. This is the affidavit filed in this case as Exhibit A to Murray's affidavit of prejudice against respondent. Its relevance to respondent is not obvious (R 53; Pet. A-8).

Paragraph 10 also relates to and incorporates into the affidavit against respondent, Exhibit A, Murray's affidavit against Judge Collinson.

In paragraph 11, petitioner alludes to a conference between respondent and counsel held in chambers at Kansas City on July 29, 1969, but states nothing in substance except that by alluding to "the Balfour cases" it confirms that the cases have been administered as a unit.

In paragraph 12, Mr. Spanos complains of the difficulties that he had had with Judge Collinson and Judge Oliver in not having a record made of even the most informal conferences. He concedes that on July 29, 1969, respondent came to Kansas City from St. Louis without bringing his reporter and complains that upon Mr. Spanos' request for a reporter none was available. There is no allegation that respondent knew of any prior request by Mr. Spanos nor Mr. Spanos' feelings in this regard toward Judge Oliver and Judge Collinson.

Paragraph 13 alleges that defendant's proposed "discovery program" is a sham and argues about plaintiffs' contentions that defendants were not entitled to any discovery by reason of Rule 6(b)(2), but states no fact

or reason supporting a charge of bias or prejudice on the part of respondent.

Paragraph 14 extends plaintiffs' arguments (and relates to all plaintiffs as a unit), conceding that Judge Collinson had found that plaintiffs had wrongfully obstructed defendant's discovery and that defendant, without any fault on its part, had been denied any opportunity for discovery throughout the period since February 20, 1959, and that in respect to defendant's discovery Judge Collinson had found that Mr. Spanos had dishonored a promise that he had made to Judge Collinson in open court at a hearing on December 16, 1968, not to object to discovery sought by defendant as ordered by the court on September 17, 1968. The paragraph states that on the basis of respondent's remarks at the conference of July 29, 1969, without stating what were the remarks, it was clear to Mr. Spanos that respondent intended to open up discovery in the cases. There is no statement of fact or reason in this paragraph which gives fair support to a charge of personal bias or prejudice on the part of respondent against the plaintiffs or in favor of the defendant.

Paragraph 15 alludes to possible sources of alleged but unsupported prejudgment by respondent. The first of these is an alleged revelation by respondent shortly after the conference on July 29, 1969, began that he had consulted Judge Collinson about "the Balfour cases." There is not a scintilla of allegation as to what the conversation consisted of, whether it was simply the fact that the cases had been assigned to respondent, or whatever. There is absolutely no fact stated to give fair support to the charge of a bent of mind of respondent that may prevent or impede impartiality of judgment.

Paragraphs 16, 17 and 18 state that the second possible source of "the origins of [respondent's] unwar-

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ranted prejudgment" was a bundle of sheets of typewritten material to which respondent referred and advised the parties was a synopsis pre[illegible]ed for him by "the clerk." There is no allegation as to what the papers contained except the statements of respondent that they were nothing but a "brief reference to the various entries and filed papers in the cases * * * a prepared characterization * * * not binding upon anyone, as the original entries and documents speak for themselves" (R 50). None of the allegations in these paragraphs state any fact or reason which gives fair support to the charge of personal bias or prejudice in the mind of respondent.

Paragraph 19 simply states that three days after the parties, through their counsel, had first met respondent, and on August 1, 1969, Mr. Spanos, entirely on his own initiative and responsibility and not upon the initiative or the responsibility of any party, wrote to respondent expressing Mr. Spanos' opinion that respondent was disqualified and expressing Spanos' hope that respondent would voluntarily withdraw as presiding judge "thus making the filing of *another* affidavit of prejudice unnecessary." The only possible significance of this is twofold. First, it is a recognition that the plaintiffs as a unit had already disqualified the prior judges by affidavit of prejudice, hence the reference to "another" affidavit of prejudice; and, secondly, the affidavit of prejudice purportedly made by Murray directed against respondent was in fact made by Mr. Spanos, the attorney, and not a party, and expressed the opinions and beliefs of Mr. Spanos rather than of the parties, as can be seen to be true throughout the various affidavits filed in this case.

Clearly, there are no statements of fact or reason in the affidavit which give fair support to the charge of personal bias or prejudice in the mind of respondent

against petitioners Murray or any of the plaintiffs or in favor of the defendant in the case.

B. The Supplemental Affidavit of Prejudice.

Petitioners represent in their petition that Delta Theta Phi legal fraternity, of which respondent is a member, is a party defendant to petitioners' case. At page 3 they state that this fraternity "has been named but not served as a defendant in the litigation"; at page 5 they state that the instant case involves a claim of conspiracy with Delta Theta Phi, and at page 6 that this fraternity has been named as defendant in this litigation. At page 11 it is conceded that Delta Theta Phi was not named as a defendant in the original complaint, but it is stated that Delta Theta Phi has been named in the various amended complaints, including the one which petitioners obtained leave to file, without revealing to this Court that petitioners had refused to file an amended complaint and have never filed one (Resp. A-11, 12, infra). At pages 27 and 29 it is represented that this fraternity has been named as a defendant in this case and that it is a party to the case. At page 32 it is again represented that this fraternity is named as a party defendant, and on page 37 it is represented that this fraternity is one of the parties in the case.

These representations are untrue. Nor are they supported by the supplemental affidavit of prejudice. In that affidavit Murray states that "the complaint in my case charges an illegal conspiracy on the part of, among others, the L. G. Balfour Company ("Balfour" herein) and practically all of the leading college social and professional fraternities and sororities, including Judge Harper's fraternity, Delta Theta Phi" (R 135). However, petitioners concede that Delta Theta Phi, although it may in petitioners' minds have been included generally

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as one of "practically all the leading college social and professional fraternities and sororities" as a group, was not expressly named in the complaint in petitioners' case (Pet. p. 11). Although petitioners represent that Delta Theta Phi is named in the amended complaint which petitioners sought leave of court to file in March, 1967, it is not stated in the affidavit that the amended complaint was ever filed. Indeed, the fact is that petitioners refused to file the amended complaint in their case when leave was granted plaintiffs in the related cases to file their amended complaints on October 17, 1969 (Resp. A-11, 12, infra).

The truth is that Delta Theta Phi fraternity is not now named as, nor has it ever been, a party to this case.

Furthermore, from as early as March 31, 1967, in the reply brief filed by Mr. Spanos in support of plaintiffs' (including petitioners) joint motion for leave to file amended complaints, it was represented to the court that no service would be attempted by plaintiffs on any fraternity and that no damages are being sought by these plaintiffs against any fraternity (Pet. A-11, 12). Further, in the plaintiffs' (including petitioners) reply to suggestions in opposition to plaintiffs' motion for leave to file amended and supplemental complaints, plaintiffs (including petitioners) represent that they do not intend to proceed against any of the fraternity or sorority defendants (Pet. A-11). See also Resp. A-10, 11, infra.

Indeed, all defendants in all the related cases, including petitioners' case, other than defendant L. G. Balfour Company, were voluntarily dismissed by all plaintiffs on January 19, 1970 (Resp. A-8, 9, infra).

Having incorrectly represented in their petition that Delta Theta Phi is and was a party defendant in petitioners' case, upon this erroneous hypothesis petitioners

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attempt to build and support a charge that respondent "had accepted his designation and had continued to participate and make rulings in the case without revealing the fact, which he was later forced to concede, that he is a member of a fraternity that has a direct interest in the outcome of the case and that has been named but not served as a defendant in the litigation" (Pet. 3); "knowingly concealed the fact of membership for some time after his assignment to these cases in July of 1969" (Pet. 28); and "neglected to reveal his membership in a fraternity named as a party defendant, until forced by the petitioners to admit his membership" (Pet. 32).

It is true that Judge Oliver was forced by petitioners' counsel to disqualify himself because he was a member of Phi Delta Theta fraternity. However, that fraternity was one of the plaintiffs in one of the related cases then pending and the question presented concerned discovery of a ritual of that fraternity (Pet. A-15, 18). Although petitioners argue that Judge Collinson disqualified himself because of his membership in Lambda Chi Alpha (Pet. 7, 28), this is an untenable position when viewed in the light of the statements made by Judge Collinson in his order filed July 3, 1969 (Pet. A-13), and the affidavit of prejudice of Buchroeder against him.

In view of the record there was no more occasion for respondent to have advised the parties before petitioners' request on September 21, 1969, that he was a member of Delta Theta Phi than to advise the parties that he was a Democrat or a Mason. These facts, together with his membership in Delta Theta Phi and the Order of the Coif, appear in his biography at page 952 in *Who's Who in America*, 1968-1969. It would be difficult to find any federal judge who was not at one time a member of one or more of "the leading college social and professional fraternities."

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C. The Second Supplemental Affidavit of Prejudice.

Petitioners filed for the first time in the Court of Appeals for the Eighth Circuit as an exhibit to their petition for writ of mandamus or prohibition a "Second Supplemental Affidavit of Bias and Prejudice" (R 147). This affidavit purportedly supports their motion for change of judge and the petition for writ of mandamus or prohibition in respect to its denial, but it was never submitted to nor considered by respondent. As is shown in its caption, it is a "second supplemental affidavit" by this party. It should not be considered in view of the provision of Title 28, U. S. C. §144:

> "A party may file only one such affidavit in any case,"

and for the reason that it was never presented to the district court. Further, the "second supplemental affidavit" does not state any fact or reason which gives fair support to the charge of personal bias or prejudice on the part of respondent either against petitioners or in favor of any adverse party. Petitioners refer to rulings by the court, respondent's attempts to familiarize himself with the records in the cases, respondent's approach to problems in the litigation before he became the presiding judge, complaints about respondent's order entered August 4, 1969, proceedings in court held by Judge Collinson on December 16, 1968, respondent's ruling and failure to rule on certain motions, respondent's setting of the cases for trial, respondent's rulings on matters relating to discovery and a description of the forms for the clerk's minutes, none of which in any manner state facts or reasons which give fair support to the charge that respondent's bent of mind may prevent or impede impartiality of judgment. To the extent that these charges

relate to respondent, they have to do only with his rulings in the cases and in no way tend to establish any personal bias on his part in favor of any adverse party or against petitioners or the plaintiffs in the cases. *Berger* v. *United States, supra,* 255 U. S. at p. 31.

It is significant that throughout the affidavit all the references to the parties are as to "plaintiffs" collectively rather than to the petitioners herein. For example, it is stated that "*plaintiffs* had come to hold a number of grievances arising out of the conduct of the defendants and Judges Oliver and Collinson" (R 148-149), which contributed to *plaintiffs'* belief that the court had been biased and prejudiced and that had led to disqualification; and in respect to respondent's rulings and actions it is likewise complained that *plaintiffs* held the various grievances. This is further proof that the identical issues presented by the Buchroeder motion for change of judge and affidavit directed against Judge Collinson and the identical parties were involved there as here; that it is the feelings of the *plaintiffs,* through their attorney, that are relevant throughout the disqualification proceedings and that the provision of Title 28, U. S. C. §144 that a party may file only one such affidavit in any case bars the disqualification proceedings directed to respondent.

III. The Instant Disqualification Proceeding Is Barred by the Provision of 28 U. S. C., §144, That a Party May File Only One Such Affidavit in Any Case.

As shown in the statement of the case, the related cases, including petitioners' case (No. 737), and the Buchroeder cases (Nos. 683, 684 and 729) have been consolidated for all motions, pleadings, orders or other filings which are deemed to apply equally to each of the actions as though individually filed therein (Pet. A-7). Judge

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Oliver was forced to recuse himself by reason of charges of bias and prejudice directed to him by counsel for plaintiffs, including Buchroeder and the petitioners herein. The cases were then transferred to Judge Collinson. After Judge Collinson had presided in the cases for little more than a year he advised counsel for plaintiffs, including petitioners, that he intended to dismiss the cases, whereupon a motion for change of judge and affidavit of prejudice against Judge Collinson by Buchroeder were filed by attorneys for all plaintiffs, including petitioners. In addition, an affidavit of prejudice directed to Judge Collinson was filed by Murray, one of the petitioners herein, as an exhibit to the affidavit of prejudice filed by him against respondent herein. On the same date that the Buchroeder affidavit of prejudice and motion for change of judge were filed there was also filed by all plaintiffs in the related cases, except Buchroeder but including petitioners, a motion for stay of all proceedings and suggestions in support thereof (Resp. A-1-4, infra). In this motion and the memorandum in support it was noted that the cases have been treated as a single group or unit, that the issues raised by the Buchroeder motion to change judge are common to all the cases in the group and that the disposition of the said motion would be dispositive of the identical issues which exist in all the related cases, including petitioners Murray case (No. 737).

After Judge Collinson disqualified himself from acting in all the related cases pursuant to the motion to change judge and the affidavit of prejudice, the cases were assigned to respondent. Respondent first met with counsel for all parties in Kansas City on July 29, 1969, and three days thereafter received a letter from counsel for all plaintiffs, including petitioners, requesting that re-

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spondent disqualify himself from the cases. Thereafter, there was filed a motion to change judge and affidavit of prejudice against respondent by petitioner Murray. Again, there were filed by counsel for all plaintiffs in the related cases a motion for stay of all proceedings and a memorandum in support again confirming that for many years the cases had been treated as a single group or unit, that rulings made in one case had been applicable to all of the cases, that the issues raised by the motion to change judge are common to all the cases and the disposition of the motion would be dispositive of the identical issues which exist in each of the cases. (Resp. A-5-8, infra).

After respondent denied petitioners' motion to change judge, a motion for rehearing was filed by petitioners accompanied by another affidavit of prejudice by petitioner Murray directed to respondent. After respondent denied the motion for rehearing, petitioners filed a petition for writ of mandamus or prohibition to the Court of Appeals for the Eighth Circuit to review that action and with that petition filed yet another affidavit of prejudice directed to respondent, but which had not been presented to respondent.

28 U. S. C., §144, clearly provides that a party may file only one affidavit of prejudice in any case. Here all plaintiffs, including petitioners, acknowledged that the cases were consolidated and were treated as a single unit or group, and that all motions, pleadings, orders and other filings are deemed to apply equally to each of the actions as though individually filed therein. Hence, the motion to change judge and affidavit of prejudice directed by Buchroeder against Judge Collinson are deemed to apply equally to each of the actions, including petitioners' case, as though individually filed therein. The

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acceptance of this status by petitioners is clearly revealed by the motion to stay proceedings and the memorandum in support thereof filed by petitioners Murray together with the plaintiffs in the other related cases concurrently with the filing of the Buchroeder motion and affidavit. Clearly this represents an affidavit of prejudice as provided in 28 U. S. C., §144, by petitioners herein against Judge Collinson, which resulted in Judge Collinson's disqualification as presiding judge in the group of related cases.

Petitioners have pursued and had the one disqualification proceedings allowed by 28 U. S. C., §144. They are thus barred from further proceeding under the statute against respondent or any other district judge. As stated in the *Berger* case "* * * the section in its care permits but 'one such affidavit'." 255 U. S. at p. 35.

It has been observed by various federal courts that to permit successive disqualifications on successive affidavits of prejudice could rightly make judicial procedure the subject of ridicule and contempt. *Allen* v. *duPont* (D. C. Del., 1948), 75 F. Supp. 546. *United States* v. *Hoffa* (D. C. Tenn., 1965), 245 F. Supp. 772, at page 775 quotes from the *Allen* case (75 F. Supp. at 549) as follows:

> "If the affidavit filed in this case is to prevail conceivably every judge in the Federal system might in monotonous succession be given the same sort of passport and our judicial procedure be rightly made the subject of ridicule and contempt,"

and also from *Martin* v. *Texas Indemnity Insurance Co.* (D. C. Tex., 1962), 214 F. Supp. 477, 480:

> "28 U. S. C. A., Section 144, imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here."

Indeed, if the motion and affidavit prescribed in the section had the automatic effect urged by petitioners and could be used by various parties in the related cases in this litigation, our judicial procedure would be rightly made the subject of ridicule and contempt.

Here the disqualification procedure has already resulted in two changes of judge in the past two years and has frustrated the efforts of the respective district judges to process the cases toward trial or disposition.

Conclusion.

This Court in the *Berger* case noted the consideration which influenced its decision there, that the disqualification of a judge pursuant to the statute in question was of no serious detriment to the administration of justice nor inconvenience worthy of mention because it is of no concern to the judge nor to a party that he preside, that serious delay of trial is avoided by requirement of the statute and that the section in its care permits but "one such affidavit."

From the record in this case it is clear that those considerations are not present here. Here it is of concern to the parties and to the administration of justice that there be no further frustration of the judicial process by successive disqualification.

These considerations weigh against the automatism urged by petitioners for the affidavit provided by 28 U. S. C., §144. In these times of multiple party, complex litigation no case could be administered efficiently and justly if successive disqualification of judges were permitted.

It is submitted that in the successive affidavits of prejudice by petitioners herein there is stated no fact or reason which fairly supports personal bias or prejudice

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on the part of respondent against petitioners or in favor of an adverse party.

For these reasons it is submitted that the petition for writ of certiorari should be denied. However, if it should be the disposition of this Court to accord 28 U. S. C., §144, the automatism urged by petitioners herein, then the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation rather than be deferred until after further proceedings are had in these cases.

Respectfully submitted,

EDWARD F. HOWREY,
A. DUNCAN WHITAKER,
KEITH E. PUGH, JR.,
1707 H Street, Northwest,
Washington, D. C. 20006,

THOMAS E. DEACY, JR.,
JOHN H. ROSS,
2300 Bryant Building,
Kansas City, Missouri 64106.

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APPENDIX.

In the United States District Court for the
Western District of Missouri
Western Division.

COLUMBUS STATIONERY COMPANY,
Plaintiff,

vs.

L. G. BALFOUR COMPANY, et al.,
Defendants.

and Related Cases Numbered 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

No. 736

MOTION TO STAY ALL PROCEEDINGS.

Come now the plaintiffs in the above identified cases and move the Court for an Order staying all proceedings in the said cases above identified pending the final determination of the Motion to Change Judge filed on May 13, 1969, in Cases bearing Docket Nos. 683, 684 and 729 currently pending before this Honorable Court, or until the filing in each of the above identified cases of a similar Motion to Change Judge in each of Cases bearing Docket Nos. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, whichever is sooner. This Motion is made on the basis of the Memorandum in support filed herewith, the Motion to Change Judge filed in said Cases 683, 684 and 729, the Affidavit of Prejudice executed by Mr. John A. Buchroeder in support of and filed with the said Motion to Change Judge, all of the other moving papers filed

with said Motion in Cases 683, 684 and 729, and all of the pleadings and papers in said Cases 683, 684 and 729, as well as all of the pleadings and papers in the above identified cases.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Plaintiffs in Cases No. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

Certificate of Service.

I hereby certify that service of the foregoing Motion to Stay all Proceedings and the Memorandum in support thereof, was made upon the plaintiff in Case No. 683, Phi Delta Theta Fraternity, by mailing a copy thereof, postage prepaid, to its attorneys and counsel, Thomas W. Van Dyke, Esquire, of Linde, Thomson, Van Dyke, Fairchild & Langworthy, 3rd Floor, Union National Bank Building, Kansas City, Missouri; on the plaintiffs in Case No. 684, Sigma Chi Corporation and Sigma Chi Fraternity, by mailing a copy thereof to their attorneys and counsel, Thomas J. Wheatley, Esq., of Kemp, Koontz, Clagett & Norquist, 1200 Commerce Tower, Kansas City, Missouri; and on the defendant, L. G. Balfour Company,

in Cases No. 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, by mailing a copy thereof to its attorneys, Howrey, Simon, Baker & Murchison, 1707 H Street Northwest, Washington, D. C., and the firm of Deacy and Deacy, 2300 Bryant Building, Kansas City, Missouri, this 13th day of May, 1969.

ROBERT G. OBERLANDER

In the United States District Court for the
Western District of Missouri
Western Division.

COLUMBUS STATIONERY COMPANY,
Plaintiff,

vs.

L. G. BALFOUR COMPANY, et al.,
Defendants.

and Related Cases Numbered 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

No. 736

MEMORANDUM IN SUPPORT OF MOTION TO STAY ALL PROCEEDINGS.

All of the above identified cases, together with Cases bearing Docket Nos. 683, 684 and 729, are pending before the Honorable William R. Collinson, United States District Judge. All of the said cases have for many years been treated and handled as a single group or unit because of the identity of issues although not of parties, and generally rulings made in one of the cases have

been applicable to all of the cases in the group. The issues raised by the Motion to Change Judge filed in Cases 683, 684 and 729 are common to all of the cases in the group, including the above identified cases, and the disposition of the said Motion to Change Judge in Cases 683, 684 and 729 would be dispositive of the identical issues which exist in each of the above identified cases as well.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Plaintiffs in Cases No. 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194.

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,* vs. L. G. BALFOUR COMPANY, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 751 792 752 1193 753 1194

MOTION TO STAY ALL PROCEEDINGS.

Come now the plaintiffs in the above identified cases and move the Court for an order staying all proceedings in each and all of the said cases, above identified, pending the final determination of the "Motion to Change Judge" filed on August 21, 1969, in *James A. Murray and Edith B. Murray, partners, d/b/a Nassau China Company* v. *Lloyd G. Balfour et al.*, Civil Action No. 737 currently pending before this Honorable Court, or as to each of the above identified cases, until the filing in each such case of a similar motion to change judge, whichever is sooner. This Motion is made on the basis of a Memorandum in Support filed herewith, the "Motion to Change Judge," filed in said Case No. 737, the Affidavit of Prejudice executed by Mr. James A. Murray and filed in said Case No. 737 in support of said "Motion to Change Judge" therein and all of the other moving papers filed in connection with said Motion in said Case No. 737, and, in addition, on the basis of all the pleadings and papers in each and all of the above identified cases

as well as those in Cases Nos. 683 and 684, which are also currently pending before this Honorable Court.

Dated this 29th day of August, 1969.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Moving Parties.

Certificate of Service.

I hereby certify that service of the foregoing Motion to Stay All Proceedings was made upon the plaintiff in Case No. 683, Phi Delta Theta Fraternity, by mailing a copy thereof, postage prepaid, to its attorneys and counsel, Thomas W. Van Dyke, Esquire, of Linde, Thomson, Van Dyke, Fairchild & Langworthy, 3rd Floor, Union National Bank Building, Kansas City, Missouri; on the plaintiffs Case No. 684, Sigma Chi Corporation and Sigma Chi Fraternity, by mailing a copy thereof to their attorneys and counsel, Thomas J. Wheatley, Esquire, of Kemp, Koontz, Clagett & Norquist, 1200 Commerce Tower Kansas City, Missouri; on the defendant L. G. Balfour Company in Cases Nos. 729, 736, 737, 751, 752, 753, 754, 755, 792, 1193 and 1194, by mailing a copy thereof to its attorneys, the firm of Howrey, Simon, Baker & Murchison, 1707 H Street, N. W., Washington, D. C.

20006; and the firm of Deacy & Deacy, 2300 Bryant Building, Kansas City, Missouri, this 2nd day of September, 1969.

DOROTHY J. HARDESTY

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,* vs. L. G. BALFOUR COMPANY, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 751 792 752 1193 753 1194

MEMORANDUM IN SUPPORT OF MOTION TO STAY ALL PROCEEDINGS.

All of the above identified cases, together with Case No. 737, are pending before the Honorable Roy W. Harper, United States District Judge. Because of the identity of the issues, although not of the parties, all of the said cases have for many years been treated and handled as a single group or unit and rulings made in one of the cases have similarly been applicable to all of the cases in the group. The issues raised by the "Motion to Change Judge" in Case No. 737 are common to all of the cases in the group, including the above identified cases and the

disposition of the said "Motion to Change Judge" in Case No. 737, would be dispositive of the identical issues which exist in each of the above identified cases, as well.

Respectfully submitted,

NICK C. SPANOS,
6404 Wilshire Boulevard,
Los Angeles, California,

ROBERT G. OBERLANDER of the Firm of
KURANER, OBERLANDER, LAMKIN & DINGMAN
1111 City National Bank Building
Kansas City, Missouri
BAltimore 1-3443

Attorneys for Moving Parties.

In the United States District Court for the
Western District of Missouri
Western Division.

J. A. BUCHROEDER & COMPANY *Plaintiff,*	Nos. 729 754 736 755
vs.	737 792
L. G. BALFOUR COMPANY, et al., *Defendants.*	751 1193 752 1194
and Related Cases.	753

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO DESIGNATED PARTIES ONLY.

Come now plaintiffs in each of the above-captioned cases and, pursuant to the provisions of F.R.C.P. 41(a) (1) (i), file

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

of plaintiffs' causes of action as against the remaining defendants except L. G. Balfour Company, plaintiffs hereby reserving, retaining and continuing their actions against the defendant L. G. Balfour Company.

NICK C. SPANOS
6361 Wilshire Boulevard
Los Angeles, Calif. 90048

and

SHOOK, HARDY, OTTMAN,
MITCHELL & BACON

By LANE D. BAUER

JOHN C. DODS
915 Grand Avenue
Kansas City, Mo. 64106
BA 1-3611

Attorneys for Plaintiff.

Certificate of Service.

This is to certify that a copy of the foregoing Notice of Voluntary Dismissal was personally delivered to Thomas E. Deacy, Jr., Deacy and Deacy, and to Keith E. Pugh, Jr., Howrey, Simon, Baker & Murchison, attorneys for defendant L. G. Balfour Company, this 19th day of January, 1970.

JOHN C. DODS

In the United States District Court
Western District of Missouri
Western Division.

J. A. Buchroeder & Company *Plaintiff,* vs. L. G. Balfour Company, et al., *Defendants.* and Related Cases.	Nos. 729 754 736 755 737 792 751 1193 752 1194 753

TRANSCRIPT OF PROCEEDINGS.

Be It Remembered, that at 1:00 o'clock p.m. of Friday, October 17, 1969, at the United States Court House, Kansas City, Missouri, the following proceedings were had before the Honorable Roy W. Harper, District Judge for the Eastern District of Missouri.

Appearances.

Mr. Nick C. Spanos, attorney at law, 6404 Wilshire Boulevard, Los Angeles, California 90048.

Messrs. Thomas E. Deacy, Jr., and John H. Ross III of the law firm of Deacy and Deacy, 2300 Bryant Building, 1102 Grand Avenue, Kansas City, Missouri 64106.

Messrs. Keith E. Pugh, Jr., and A. Duncan Whitaker of the law firm of Howrey, Simon, Baker & Murchison, 1707 H Street, N. W., Washington, D. C. 20006.

Mr. Thomas J. Wheatley of the law firm of Kemp Koontz, Clagett & Norquist, 1200 Commerce Tower Building, Kansas City, Missouri 64199.

Mr. Thomas W. Van Dyke of the law firm of Linde,

Thomson, Van Dyke, Fairchild & Langworthy, Floor 3, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106.

Mr. Arthur C. Popham, Jr., of the law firm of Popham, Thompson, Popham, Trusty & Conway, 13th Floor, Commerce Trust Building, Kansas City, Missouri 64106.

* * * * * * *

(Transcript page 24)

"MR. SPANOS: I would say substantially that is it.

Now, your Honor, on the serving of the fraternities that are named as defendants, the decision to list the fraternities was made before I came into these cases, then there was a problem whether to serve them or not, and there was a lot of indecision about it, largely because most of the plaintiffs, I think practically all of them at that time, were doing business with the fraternities, and did not want to incur the ill will of the membership for something they didn't think the members were really to blame for, so we decided not to serve them, and it went on like that, and finally it reached the point where to reverse that decision and to serve the fraternities would have opened up the door, well, a couple more years before you could get to trial, so we made the representations that your Honor saw in the file in writing, and we repeated them and confirmed them again last December 16th, at the hearing before Judge Collinson, and it was not my intention to serve the other defendants, nor is it my intention now to serve them; * * *"

* * * * * * *

(Transcript page 33)

"MR. DEACY: Now, your Honor, I understand that you have today granted leave to the plaintiffs to file amended complaints?

THE COURT: The ones that are in the file; they're here.

MR. DEACY: Are they filed? I don't think there have any been filed.

THE COURT: Well, there's a motion for permission to file, and I'm going to give them permission to file. There's the whole outfit right there. I'm going to sustain that motion.

MR. DEACY: Are they taken to be filed as of today or will the plaintiffs now come in if they see fit and file some?

MR. SPANOS: Everyone will be filed except Mr. Murray's. I have instructions not to file his amended complaint.

MR. DEACY: Are you going to file amended complaints?

MR. SPANOS: I just now said we will file all the amended complaints which we sought leave to file.

THE COURT: Except Mr. Murray's.

MR. SPANOS: Except Mr. Murray's."

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Certificate.

I, OLIVE L. POOLE, Official Court Reporter, Division 1, United States District Court for the Eastern District of Missouri, Eastern Division, do certify that I was present at the time and place set forth in the caption sheet hereof and took down in stenotype all of the proceedings in connection with the matters herein, that I thereafter transcribed the same into typewriting and that the foregoing pages 2 to 35, inclusive, are a true and complete transcription of my stenotype notes.

OLIVE L. POOLE